Supreme Court, U. S.
FILED
MAR 20 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1476

HENRY STARLEY,
Petitioner,

v.

CITY OF BIRMINGHAM,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA COURT OF
CRIMINAL APPEALS

RITCHEY & RITCHEY, P. A.
Ferris S. Ritchey, Jr., Esquire
Suite 405, 11 West Oxmoor Rd.
Birmingham, Alabama 35209

Attorney for Petitioner

THE PAUL M. HARROD COMPANY, BALTIMORE, MARYLAND 21234

INDEX

TABLE OF CONTENTS

Page

OPINION BELOW. 2

JURISDICTION 2

QUESTION PRESENTED. 2

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED 3

STATEMENT 3

REASONS FOR GRANTING THE WRIT. 4

CONCLUSION 18

TABLE OF CITATIONS

Cases

Associated Industries of Alabama v. State,
55 Ala. App. 217, 314 So.2d 879 (1975) 12,13,14,15
East Coast Lumber Terminal v. Town of Babylon,
2 Cir. 174 F.2d 106. 14
Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585,
100 L.Ed. 891 14

Page

John F. Lawhon Furniture Company
v. Melvin Bailey, (D.C. Ala. CA 72-1109) 15
Marguia v. Municipal Court for Bakersfield,
124 Cal Reptr. 204, 540 P.2d 44 (1975).....6,8
Miller v. California, 413 U.S. 15 (1973) 5,10,11
Oyler v. Boyles, 368 U.S. 448, 82 S.Ct. 501,
7 L.Ed.2d 446 (1962).....7
People v. Utica Daw's Drug Co., 16 App. Div.2d 12,
225 N.Y.S.2d 128, 4 A.L.R.3d 393 (1962).....8
Simonetti v. City of Birmingham, 55 Ala.App. 163,
314 So.2d 83 (1975).....7,11,12,13,14,15,16
Snowden v. Hughes, 321 U.S.1, 64 S.Ct. 397,
88 L.Ed. 497 (1944).....8
Sunday Lake Iron Co. v. Wakefield,
247 U.S. 350, 38 S.Ct. 495,
62 L.Ed. 1154 (1918).....8,14
Two Guys v. McGinley, 366 U.S. 582, 81 S.Ct. 1135,
6 L.Ed.2d 551 (1961).....6,7
Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064,
30 L.Ed. 220 (1886).....6,8,11,13,14

Miscellaneous

United States Constitution,
First Amendment 3
Fourteenth Amendment 2,3,6,7
City of Birmingham Ordinance 16-16, As Amended 3
City of Birmingham Ordinance 16-18,
As Amended.....2,3,4,9,12,16
Title 28 U.S.C. § 1257(3).....2,3

INDEX TO APPENDIX

Page

Appendix A.....A. 1
Appendix B.....A. 8
Appendix C.....A. 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. _____

HENRY STARLEY,
Petitioner,

v.

CITY OF BIRMINGHAM,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

The Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Alabama Court of Criminal Appeals entered in the above case on October 16, 1979.

OPINION BELOW

The opinion of the Alabama Court of Criminal Appeals is appended hereto as Appendix A (A. 1-A. 7). The denial of a Petition for Writ of Certiorari by the Supreme Court of Alabama is attached hereto as Appendix B (Starley v. City of Birmingham, 377 So.2d 1131, [Ala. Crim. App. 1979]; Starley v. City of Birmingham, 377 So.2d 1134, [Ala. 1979]) (A. 8).

JURISDICTION

The Judgment of the Alabama Court of Criminal Appeals was entered on October 16, 1979 (Appendix A, A. 1-A. 7). Rehearing was denied by the Alabama Court of Criminal Appeals on November 20, 1979 (Appendix A). The Supreme Court of Alabama denied certiorari on December 21, 1979 (Appendix B, A. 8). This Court's jurisdiction is invoked under Title 28 U.S.C. § 1257(3) (Appendix C, A. 9-A. 12).

QUESTION PRESENTED

Whether the enforcement of City of Birmingham Ordinance 16-18, as amended, against Petitioner and others of his class who own, operate, or are employed by adult book stores or adult theatres in the City of Birmingham, while permitting owners, operators, and employees of other business establishments in the city, for whatever reason or justification, to sell publications or show movies which describe or depict sexual conduct also proscribed by said ordinance, works out unequally and invidiously towards Petitioner and others of his class and constitutes discrimination violative of the Equal Protection Clause of the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments of the United States Constitution, the pertinent provisions of City of Birmingham Ordinance 16-18, as amended, and Title 28 U.S.C. § 1257(3), appear in Appendix C (A. 9-A. 12) (U.S. Const. Amends. 1, 14; City of Birmingham Ordinance 16-16, as amended; City of Birmingham Ordinance 16-18, as amended).

STATEMENT

1. The Petitioner was charged with violation of the obscenity ordinance of the City of Birmingham. The complaint alleged that Petitioner ". . .knowingly and unlawfully sold an obscene book or magazine or matter entitled, "My Black Lover", to J. R. Walkinshaw which depicted or portrayed the following sexual conduct: actual act or acts of homosexuality between males, fellatio contrary to and in violation of Section 16-18 of the General Code of the City of Birmingham, Alabama, 1964, as amended."

On May 18, 1978, the Petitioner was tried before a jury on the Complaint before the Honorable William A. Cole. After a one-day jury trial, Petitioner was found guilty. Petitioner was sentenced to pay a fine of $500.00 and perform hard labor for the City of Birmingham for 180 days as additional punishment. The fine was assessed by a jury and the hard labor sentence was added by the Court.

2. A Motion to Quash was filed and raised constitutional questions as to the ordinance under which Petitioner was tried, both as written and as applied to him. The Motion to Quash

specifically raised the issue of arbitrary and intentional discriminatory enforcement of the ordinance (obscenity) by the city. The city purposefully and intentionally enforces its obscenity ordinance against one class of employees, those employed in adult bookstores and adult theatres, while permitting another class of employees, those employed in non-adult bookstores or theatres (general patronage businesses such as convenience stores, drug stores, news stands, bookstores and family theatres), to sell books and magazines or exhibit films which describe or depict sexual conduct proscribed by the city's obscenity ordinance, without fear of prosecution.

The Motion to Quash was overruled, the Petitioner was tried to a jury and found guilty as charged in the complaint. The sentence imposed by the jury and the Court was suspended pending appeal.

4. The Court of Criminal Appeals affirmed Petitioner's conviction with opinion on October 16, 1979, and Application for Rehearing was timely filed and denied on November 20, 1979 (Appendix A, A. 1-A. 7).

5. A Petition for Writ of Certiorari was timely filed with the Supreme Court of Alabama and was denied without opinion on December 21, 1979 (Appendix B, A. 8).

REASONS FOR GRANTING THE WRIT

The Petitioner was arrested, tried, and convicted for selling a publication entitled "My Black Lover" in alleged violation of City of Birmingham Ordinance 16-18, as amended.

City of Birmingham Ordinance 16-18, as amended, states:

> "It shall be unlawful for any person to knowingly publish, print, exhibit, participate in the exhibition or performance of, or allow or permit the exhibition or performance of, distribute, or have in his possession with intent to distribute, exhibit, sell, or offer for sale any obscene matter in the City or the police jurisdiction thereof."

Found within Section 16 of this ordinance are definitions of words and terms which, for the purpose of the ordinance, have the meanings ascribed to them by this section. "Obscene" is defined as follows:

> "To the average person, applying contemporary community standards, the work or matter taken as a whole, appeals to the prurient interests; the work or matter depicts or describes, in a patently offensive way, sexual conduct; and the work or matter, taken as a whole lacks serious literary, artistic, political or scientific value."

The ordinance thus adopts the guidelines set out in *Miller v. California*, 413 U.S. 15 (1973), in its definition of "obscene".

"Sexual conduct" is defined in the ordinance as follows:

> "Any act of masturbation, excretory functions, homosexuality, sadomasochistic abuse, *nudity*, sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such a person be a female, breasts, *whether or not any such conduct is actual or simulated and lewd exhibition of the genitals.*" (Emphasis added).

"Nudity" is defined in said ordinance as:

> "The showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering or the showing of the female breasts with less than a fully opaque covering of any portion thereof below the top of the nipple or the depiction of covered male genitals in a discernibly turgid state."

It is Petitioner's contention that the City of Birmingham, through its Vice Squad in the Police Department, exercises prosecutorial discretion in selecting the defendants it will prosecute under this ordinance.

It is a well-settled proposition that the Equal Protection Clause of the Fourteenth Amendment prohibits discriminatory enforcement of a law by administrative or executive officials. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). In *Yick Wo* the Court stated:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." 118 U.S. at pp. 373-374.

The rationale of *Yick Wo* applies equally to the enforcement of a city's municipal laws. In *Marguia v. Municipal Court for Bakersfield*, 124 Cal. Reptr. 204, 540 P.2d 44 (1975), the California Supreme Court was confronted with Defendants charged with violations of municipal laws. Citing *Two Guys v.*

McGinley, 366 U.S. 582, 81 S.Ct. 1135, 6 L.Ed.2d 551 (1961), and *Oyler v. Boyles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962), the California Court declared:

> "The Court explicitly recognized both that the Constitutional protection against discriminatory law enforcement applies to the enforcement of criminal statutes and that such discriminatory enforcement may be raised as a defense in the criminal proceedings themselves."

In *Simonetti v. City of Birmingham*, 55 Ala.App. 163, 314 So.2d 83 (1975) the Alabama Appellate Court also acknowledged that a Defendant may properly raise selective or discriminatory enforcement of a municipal ordinance as a defense. The Petitioner did this in the Trial Court and before the Appellate Court, alleging discriminatory enforcement of City of Birmingham Ordinance 16-18, as amended, against him and other adult book store and adult theatre operators in violation of the Equal Protection Clause of the *Fourteenth Amendment*. The Alabama Appellate Court, in its opinion in this case, states that "Although no clear standards exist for the quantum or type of proof sufficient to illustrate discriminatory enforcement of a statute or municipal ordinance, three elements must generally be proved: (1) selectivity in enforcement, (2) selectivity that is intentional, and (3) selectivity based on some invidious or unjustifiable standard such as race, religion, or other arbitrary classification. Annot., 4 A.L.R.3d 404, 410 (1965); 13 Proof of Facts 2d Section 5 (1977), and authorities cited therein." The Court found that Petitioner had not met his burden of proof in this regard.

To prove deliberate systematic, discriminatory application of law towards an individual, it must be shown that the

application towards the individual is different from others within his class *or that the class is being discriminated against. Yick Wo v. Hopkins, supra; Marguia v. Municipal Court for Bakersfield, supra.*

The Appellant is cognizant of the fact that nonenforcement of the statute of itself is not sufficient to establish discrimination, *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944), and that a heavy burden rests on the defendant to establish conscious, intentional discrimination. In meeting the burden, the United States Supreme Court has said:

> "The purpose of the equal protection clause of the Fourteenth Amendment is to secure to every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."
>
> . . .
>
> "There must be something more–something which in effect amounts to an intentional violation of the essential principle of practical uniformity." *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 353, 38 S.Ct. 495, 62 L.Ed. 1154 (1918).

When selective enforcement is designed to discriminate against the persons prosecuted without any intention to follow it up by general enforcement against others the boundaries of equal protection are crossed and violated. *People v. Utica Daw's Drug Co.*, 16 App. Div.2d 12, 225 N.Y.S.2d 128, 4 A.L.R.3d 393 (1962).

Petitioner admits that the "quantum" of proof might not be present, but argues that the proof offered is uncontradicted and unmistakable with reference to his contention that he and others in his class (his class being "adult book store operators") are discriminated against by the City in its enforcement of City of Birmingham Ordinance 16-18, as amended. Although stating the elements which must generally be proved, the Alabama Court completely ignored the discrimination which admittedly exists in the City of Birmingham in the enforcement of its obscenity ordinance.

(1) Selectivity in Enforcement: The uncontradicted evidence is that arrests in the City of Birmingham for violation of its obscenity ordinance were directed only against operators or employees of adult book stores and adult theatres. There were eight such adult book stores which sold publications depicting or describing the sexual conduct defined in the city's obscenity ordinance. These stores, and their employees, were subject to constant arrests for violation of City of Birmingham Ordinance 16-18, as amended. There are hundreds of drug stores, convenience stores, or other business establishments which regularly sell publications depicting or describing the sexual conduct proscribed by the city's obscenity ordinance. And yet *not one* of these operators or employees has *ever* been arrested or tried for violating this same ordinance. The arresting officer in this case swore that he knew the type of publications sold in the non-adult book stores and magazine stands; that those publications depict or describe simulated and/or explicit sexual activity, including pictures that show men and women engaged in sexual intercourse, the male with his head between the legs of a female with his face in her genitals, and a female with her head between the legs of a male; that films depicting actors in the nude with their genitals shown engaged in simulated sexual intercourse, fellatio, and cunnilingus, with the nude participants emanating

sexual sounds and movements indicating actual sexual activity, have been shown at non-adult theatres from time to time in the City of Birmingham; that, nonetheless, the only arrests made all during this time were for books or publications sold in adult book stores or films exhibited in adult theatres.

(2) Selectivity that is Intentional: The testimony of the arresting officer convincingly demonstrates that the City's focus is only on adult book stores and adult theatres and is both purposeful and intentional. The evidence shows a clear and unmistakable pattern of conduct by police officers of the City of Birmingham with reference to enforcing that city's obscenity ordinance. Since its enactment in 1973, only owners or employees of book stores classified as "adult" have been subjected to arrests under the city's obscenity ordinance. The City admits to giving a different classification to adult book stores as compared with non-adult book stores, although both sell sexually oriented materials in presumptive violation of the city's obscenity ordinance. The City admits that it prosecuted only those stores or theatres knowingly selling or exhibiting obscene matter, showing actual sexual acts (including penetration and bodily contact) as compared with simulated sexual acts where the individuals were nude and/or were in close proximity with the other but there was no penetration.

The city's obscenity ordinance was adopted by the governing body of the City of Birmingham in 1973, following the *Miller* decision. The ordinance's proscription is clear: obscene matter, sold or exhibited, described or depicted, actual or simulated, is unlawful. The ordinance is due to be enforced equally against all who violate it or not at all. Nevertheless, only employees of adult book stores and adult theatres are arrested for selling sex publications or exhibiting sex films. The city admits it. The Alabama court says this is not discrimination.

Perhaps the Alabama Appellate Court associates pornography or obscenity only with graphic or pictorial illustrations of sexual conduct, rather than with written accounts of sexual activity. This is not an idea which this Court has embodied in its obscenity rulings. That is not what the ordinance itself proscribes. A completely verbal account, without photographs or illustrations, falls within the *Miller* rules, if otherwise it meets the test of that doctrine. While the photographs in publications sold in non-adult business establishments generally depict simulated sexual activity, some depict explicit sexual activity and all clearly and unmistakably describe explicit sexual activity. If it is the city's intent to prosecute only for graphic depictions of explicit sexual activity, not for written accounts of explicit sexual activity, if it is its intention to prosecute only for explicit sexual activity, not for simulated sexual activity, if it is its intention to not prosecute for nudity or lewd exhibitions of the genitals, then the city should change its ordinance and specify, as *Miller* provides, the type sexual activity it will prosecute. "If it can't be done in this fashion, then it must not be done at all." *Simonetti, supra*, at 177.

(3) Selectivity Based on. . .Other Arbitrary Classification: It is uncontradicted from the evidence that arrests in the City of Birmingham for violation of its obscenity ordinance were directed only against operators or employees of adult book stores and adult theatres. If the city's obscenity ordinance proscribes the sale or exhibition of materials which depict or describe sexual conduct, actual or simulated, then an arbitrary classification is established when the City directs its prosecutorial efforts against one class (the adult book store) for violating its ordinance while ignoring another class (the non-adult book store) for violating the same ordinance. Discriminatory application of the law towards an individual is shown when the class to which he belongs is being discriminated against. *Yick Wo v. Hopkins, supra.*

The "quantum or type of proof" offered by the Petitioner to illustrate discriminatory enforcement of the city's obscenity ordinance against him compares favorably with the "quantum or type of proof" accepted by the Alabama Appellate Court in *Simonetti v. City of Birmingham, supra,* and *Associated Industries of Alabama v. State*, 55 Ala. App. 217, 314 So.2d 879 (1975).

In this case:

1. The Petitioner was employed at Pleasure Books East, an adult book store, and sold a magazine to a police officer of the City of Birmingham in alleged violation of City of Birmingham Ordinance 16-18, as amended, for which he was arrested, tried and convicted.

2. There were numerous drug and convenience stores which sold magazines describing or depicting sexual conduct proscribed by the city's obscenity ordinance.

3. No arrests were made by the City of Birmingham for publications sold other than in adult book stores.

In the case of *Simonetti v. City of Birmingham, supra*, the facts were:

1. Simonetti sold groceries on Sunday in alleged violation of the "blue laws" of the City of Birmingham, for which he was arrested, tried and convicted.

2. Although there were other business establishments open on Sunday selling their wares in alleged violation of the city's blue laws, none of their operators or employees were arrested.

In the case of *Associated Industries of Alabama v. State, supra*, the facts were:

1. Five domestic corporations, one domestic association, and five individuals were indicted by a special grand jury of Montgomery County, Alabama, for violating the State's Corrupt Practices Law, and were arrested, tried and convicted.

2. Numerous other individuals and groups, engaged in similar political activities during this same period of time, were not indicted by the special grand jury, although they were well known to the prosecution and were known to not have filed a statement of campaign expenditures with the Secretary of State, the charge for which the others were arrested, tried and convicted.

In *Simonetti* and *Associated Industries*, both decided in 1975 by the Alabama Court, that Court cited the following in support of its finding that there was discriminatory enforcement of the penal law involved in each case:

1. "In *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, the Supreme Court said:

> 'Though the law itself be fair on its face, and impartial in appearance, yet, if it be applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.' " *Simonetti, supra*, at page 173; *Associated Industries, supra*, at page 288.

2. "In *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891, the Supreme Court said:

> 'A law non-discriminatory on its face may be grossly discriminatory in its operation.' " *Simonetti*, at 173; *Associated Industries*, at 289.

3. "In *East Coast Lumber Terminal v. Town of Babylon*, 2 Cir. 174 F.2d 106, Judge Learned Hand wrote:

> 'It has indeed been the law for over sixty years that the (14) Amendment covers the unequal enforcement of valid laws, as well as any enforcement of invalid powers.' *Yick Wo v. Hopkins*, supra." *Simonetti*, at page 173; *Associated Industries*, at page 289.

4. "In *Sunday Lake Iron Company v. Wakefield*, 247 U.S. 350-352, 38 S.Ct. 495, 62 L.Ed. 1154, the Supreme Court said:

> 'The purpose of the equal protection clause of the Fourteenth Amendment is to secure to every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute *or by its improper execution through duly constituted agents*.' " (Emphasis added). *Simonetti*, at page 174; *Associated Industries*, at 289.

5. In *Simonetti*, at page 175, this same Alabama Appellate Court said:

> "Police officers are sworn to uphold and enforce all laws within their jurisdiction. . .they permitted

> businesses in direct competition with appellant to remain open for business. . .and, thereby, go unwhipped of justice while hauling appellant into court to be fined and incarcerated.
>
> ". . .We find no trouble in concluding that appellant's constitutional rights under the Equal Protection Clause of the Fourteenth Amendment have been blatantly violated and that his arrest and conviction were brought about by invidious discrimination in the unequal enforcement of the. . .laws of the City of Birmingham. To allow this conviction to stand would be a grave miscarriage of justice and would be wrong and unjust."

6. In *Simonetti*, at page 177, cited in *Associated Industries*, at page 289, the Alabama Court said:

> "We believe that if the law, all laws, is *enforced equally* and *justice is dispensed with an even hand*, and on a non-discriminatory basis, all citizens will maintain a high regard and a lofty respect for our Court system as administered under the Constitution. If it can't be done in this fashion, then it must not be done at all."

In *Simonetti*, at page 172, the Alabama Court quotes Federal District Court Judge Sam Pointer in discussing the question of burden in *John F. Lawhon Furniture Company v. Melvin Bailey*, (D.C. Ala. CA 72-1109):

> "The question then becomes, in order to make out the case, *must the plaintiff prove intentional sort of*

malicious discrimination and enforcement, or is it sufficient if the plaintiff proves that whatever the reason or justification, nevertheless in actual fact it works out unequally and invidiously toward him or it. I think it is the latter. And if the Sheriff's Department, as I'm convinced under the evidence, cannot fully enforce this type of law throughout the entire county on a completely equal basis, then it should not be permitted to let its forces be directed as against one particular company in effect unequally, that is what it turns out to be, and again not from any intent to harm, but simply as the sheer result of the fact that there are other items, much more important that the Sheriff's Department could be doing ultimately than dealing with the victimless crime involving a number of its patrol cars in this type of investigative work. ******Either you have got to do it more equally than you have done. . .or not do it.*** (Emphasis added).

The following statement of the Alabama Court in *Simonetti*, at page 177, with appropriate changes, could well apply to this case:

> "It may be a violent presumption that the courts are not supposed to be ignorant of that which everybody knows; and everybody in this state knows one can go almost anywhere in [the City of Birmingham] and purchase a [sex magazine in presumptive violation of City of Birmingham Ordinance 16-18, as amended]. We indulge this presumption with the knowledge that the [City's obscenity] laws are not uniformly enforced."

The city's obscenity ordinance has been enforced only against owners, operators or employees of adult business establishments. The testimony in this case verifies this. There is no claim that the law cannot be enforced equally against all who violate it. It is a matter of choice. If the city has the time and the manpower to arrest the same employees of the same adult businesses time and time again, surely it can find the time and manpower to arrest employees of business establishments classified as non-adult but which nevertheless sell publications or exhibit movies which describe or depict sexual conduct proscribed by its obscenity ordinance.

Petitioner is not seeking protection from the law. He merely asks to be afforded the same protection of the law as are murderers, rapists, drug peddlers, "blue law" violators, those who violate the State's Corrupt Practices Law, and employees of the non-adult business establishments which sell adult materials.

Petitioner has elected to bring this petition solely on the issue of unequal enforcement of the city's obscenity ordinance, waiving the issue of prosecutorial misconduct which was also reviewed by the Alabama Court of Criminal Appeals. The Petitioner contends that the Alabama Court has incorrectly applied the facts to the law established from decisions of this Court with reference to equal protection of the law, and negates the necessity for review by this Court of any other issue.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Alabama Court of Criminal appeals.

Respectfully submitted,

Ferris S. Ritchey, Jr., Esquire

Attorney for Petitioner

APPENDIX A

Henry STARLEY

v.

CITY OF BIRMINGHAM.

6 Div. 840.

Court of Criminal Appeals of Alabama.

Oct. 16, 1979.

Rehearing Denied Nov. 20, 1979.

****

BOOKOUT, Judge.

Violation of City Ordinance 16-18 as amended (obscenity); sentence: $500 fine and 180 days hard labor.

On February 27, 1978, Officer John R. Walkinshaw of the Birmingham Police Vice Squad entered the Pleasure Books East store and purchased from the appellant a copy of the magazine, "My Black Lover." After personally reviewing the magazine, he presented it to City Magistrate J. M. Burns. After having examined the magazine for fifteen to twenty minutes, Mr. Burns issued a warrant for the appellant's arrest.

The magazine in question depicts explicit homosexual acts between men. There is no question that it is obscene under any standard known to law. In fact the appellant in brief and in oral argument on appeal concedes that the magazine is obscene; therefore, this appeal is based on other issues.

I

Appellant contends that City of Birmingham Ordinance 16-18 as amended was systematically and selectively enforced against him resulting in purposeful and intentional discrimination violative of the equal protection clause of the Fourteenth Amendment.

Appellant raised his contention below by a pretrial motion to quash. On the hearing on that motion, Officer Walkinshaw testified that at the time of the arrest the vice squad consisted of three officers and one supervisor. He indicated that approximately one-fourth of his time was spent handling obscenity related matters. He was instructed as to what is and is not obscene; however, he was not ordered to arrest certain individuals. Rather, he was ordered to enter various book stores, make purchases, and deliver the information gathered to the city magistrate's office for a determination of probable cause.

Officer Walkinshaw testified as to his knowledge concerning the number of adult book stores and theaters in Birmingham and the surrounding area. He also testified that numerous drug and convenience stores sold magazines (Playboy, Oui, etc.) containing sexually related matter similar to that portrayed in magazines sold at the adult book stores. Officer Walkinshaw stated that some theaters open to the general public displayed movies (X-rated) depicting explicit sexual conduct and that, as part of his duties, he had viewed some of those movies but had

made no arrests. He testified that to his knowledge no arrests were made merely because a movie contained nudity. The officer testified that in the year preceding the date of this incident, he had made four or five arrests at various book stores for their sale of obscene matter. After receipt of this testimony, the trial court overruled the appellant's motion.

[1] Although no clear standards exist for the quantum or type of proof sufficient to illustrate discriminatory enforcement of a statute or municipal ordinance, three elements must generally be proved: (1) selectivity in enforcement, (2) selectivity that is intentional, and (3) selectivity based on some invidious or unjustifiable standard such as race, religion, or other arbitrary classification. Annot., 4 A.L.R.3d 404, 410 (1965); 13 Proof of Facts 2d § 5 (1977), and authorities cited therein. It is insufficient merely to show that other violators have not been prosecuted, that there has been a laxity in enforcement, or that there has been a conscious exercise of some selectivity in enforcement. See generally: *Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962); *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *Butler v. State*, Ala.Cr. App., 344 So.2d 203, 207 (1977); *Johnson v. State*, Ala.Cr.App., 335 So.2d 663, cert. denied, Ala., 335 So.2d 678 (1976).

[2] A review of the evidence reveals that although enforcement of the Birmingham ordinance may not have been universal there is no evidence to indicate an intentional selectivity based upon an unjustifiable standard. The evidence does not indicate that the City focused its prosecutorial sights exclusively upon the appellant. It is apparent that appellant has not met his burden of proof in this regard. Consequently, his contention

is without merit. See also: *Robinson v. State*, Ala.Cr.App., 353 So.2d 528, cert. denied, Ala., 353 So.2d 534 (1977).

II

Appellant contends that the cumulative effect of the following statement and questions of the trial court denied him the right to a fair and impartial trial.

A

During the voir dire examination of the venire, the trial judge, in response to a venireman's doubt that he could not view the evidence fairly and impartially, instructed the venire that many cases contain revolting evidence which may result in a jury having unpleasant jobs, duties, and responsibilities. Furthermore, he stated that each juror would be applying contemporary community standards when viewing the magazine and that each one would not be asked to apply his or her personal opinion to it. The appellant did not object to this instruction.

[3-5] We find that the trial judge did not commit error in instructing the venire as to the possible unpleasantness of their job. It is within his province to apprise the venire of such. Furthermore, without a timely, specific objection, nothing is presented for our review. *Scruggs v. State*, Ala.Cr.App., 359 So.2d 836, cert. denied, Ala., 359 So.2d 843 (1978); 6B Alabama Digest, Criminal Law, ⬅1045. Consequently, appellant's contention is without merit.

B

[6] Next, appellant asserts that the trial judge's question to Officer Walkinshaw, "Have you ever seen this book in any other book store," suggested its obscenity. Appellant did not object to the trial court's question. We do not find the above question to be suggestive that the magazine was obscene and neither do we find that the appellant has properly raised this issue for review. *Scruggs*, supra. See also: *Van Antwerp v. State*, Ala.Cr.App., 358 So.2d 782, cert. denied, Ala., 358 So.2d 791 (1978); *Slinker v. State*, Ala.Cr.App., 344 So.2d 1264 (1977); *Robinson v. State*, Ala.Cr.App., 342 So.2d 1331 (1977).

C

Lastly, appellant contends that another question by the trial judge wherein he asked the appellant, "In other words, that thing came unwrapped," illustrated his contempt for the publication, revealed his prejudice toward him and, consequently, prejudiced the jury. Again appellant did not interpose a timely objection. Therefore, nothing is presented for our review. *Scruggs; Van Antwerp; Slinker;* and *Robinson*, supra. Additionally, we cannot imply the appellant's conclusions to the language of the question. We do not know what word or words in the question the trial judge may have emphasized. From reviewing the record (the only thing we may legally consider) the implication that could have been inferred from the trial judge's question is all too unclear.

D

Having found that the trial judge's statement to the venire and questions propounded to various witnesses do not constitute error, it is also apparent that, collectively, they did not prejudice the jury. In light of the appellant's failure to preserve any error for review as well as considering the above discussed remarks and questions under Rule 45, ARAP, we do not find that the appellant was prejudiced by those remarks.

III

Appellant contends that the trial court committed reversible error in denying his motion for a mistrial based upon a question propounded by the prosecuting attorney.

During redirect examination of Officer Walkinshaw, the prosecuting attorney asked the following questions:

> "Q. I'll ask you prior to February 27th, 1978, how many arrests had been made in the City of Birmingham for obscene magazines?
>
> "MR. RITCHEY: Your Honor, I object.
>
> "THE COURT: Overruled.
>
> "A. Approximately 21.
>
> "Q. Do you know how many convictions resulted from these arrests?"

Since the appellant raised the issue of selective enforcement, the first question above was certainly material and relevant to

that issue. No answer was given to the second question. The appellant immediately objected and moved for a mistrial. The trial court sustained appellant's objection to the second question and, after instructing the jury to disregard the question, overruled his motion for a mistrial.

[7, 8] Where the trial court acts promptly to impress upon the jury that improper statements should not be considered by them in their deliberations, the prejudicial effect of such remarks is removed. *Gavin v. State*, 52 Ala.App. 469, 294 So.2d 169, cert. denied, 292 Ala. 722, 294 So.2d 170 (1974), and cases cited therein. The trial judge, in realizing the potentially damaging consequences of the prosecuting attorney's second question, acted swiftly and professionally in instructing the jury to disregard it. We find that the trial judge's actions were not an abuse of discretion and that any error that might have arisen by the prosecutor's question was thereby cured. *Watts v. State*, 53 Ala.App. 518, 301 So.2d 280 (1974), and cases cited therein. See also: *Borden v. State*, Ala.Cr.App., 337 So.2d 1388 (1976).

Furthermore, we cannot determine whether or not the motion was directed toward the first or second question. We need not speculate as to this for the trial judge's immediate action eradicated any error that might have arisen. Likewise, a question unanswered serves as no basis for reversal. *Van Antwerp*, supra.

AFFIRMED.

All the Judges concur.

APPENDIX B

Ex parte Henry STARLEY.

(Re Henry Starley

v.

City of Birmingham)

79-185.

Supreme Court of Alabama.

Dec. 21, 1979.

Certiorari to the Court of Criminal Appeals, 377 So.2d 1131.

EMBRY, Justice.

WRIT DENIED.

TORBERT, C. J., and BLOODWORTH, FAULKNER and ALMON, JJ., concur.

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The pertinent provisions of the First Amendment are:

"Congress shall make no law . . ., abridging the freedom of speech, or of the press. . . ."

2. The pertinent provisions of the Fourteenth Amendment are:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

3. City of Birmingham ORDINANCE, Sections 16-16 and 16-18 provide:

AN ORDINANCE TO AMEND ARTICLE II OF CHAPTER 16 OF THE GENERAL CODE OF THE CITY OF BIRMINGHAM, 1964, AS AMENDED.

BE IT ORDAINED by the Council of the City of Birmingham, as follows:

SECTION I. That Article II of Chapter 16 of the General Code of the City of Birmingham, 1964, be and is hereby amended to read as follows:

Sec. 16-16. Definitions.[4]

The following words and terms, when used in this article, shall for the purpose of this article have the meanings respectively ascribed to them by this section:

Distribute. To transfer possession of, whether with or without consideration.

Knowingly. Having actual or constructive knowledge of the character and content of the subject matter. A person has constructive knowledge if a reasonable inspection under the circumstances would disclose the nature of the subject matter and the failure to inspect is for the purpose of avoiding such disclosure.

Nudity. The showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple or the depiction of covered male genitals in a discernibly turgid state.

Obscene. To the average person, applying contemporary community standards, the work or matter, taken as a whole, appeals to the prurient interest; the work or matter depicts or describes, in a patently offensive way, sexual conduct; and the work or matter, taken as a whole, lacks serious literary, artistic, political or scientific value.

Sadomasochistic abuse. Flagellation or torture by or upon a person undressed or clad in undergarments, a mask or bizarre costume or the condition of being fettered, bound or otherwise physically restrained on the part of one undressed or so clothed.

Sexual conduct. Any act of masturbation, excretory functions, homosexuality, sadomasochistic abuse, nudity, sexual intercourse or physical contact with a person's clothed or

unclothed genitals, pubic area, buttocks or, if such a person be a female, breast, whether or not any such conduct is actual or simulated and lewd exhibition of the genitals.

Work or Matter. Any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture or other pictorial representation or any statue or figure or any recording transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials. (Ord. No. 67-2, § 1; Ord. No. 73-92, § 1.)

Sec. 16-18. Publishing, printing, etc., prohibited.[6]

It shall be unlawful for any person to knowingly publish, print, exhibit, distribute or have in his possession with intent to distribute, exhibit, sell or offer for sale, in the city or the police jurisdiction thereof, any obscene matter. (Ord. No. 67-2, §3.)

Title 28, U.S.C. § 1257(3)

§1257. State courts: appeal; certiorari

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> ". . .(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or

immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."